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AUG 20 1981
ALEXANDER L. STEVA
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NO. 81-102

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

OTIS M. BAY and CHARLES H. BEAN,
Petitioners

v.

THE GOODYEAR TIRE & RUBBER COMPANY,
Respondent

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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RESTATEMENT OF QUESTION PRESENTED

Whether a promotional system which contains some subjectivity but which had no adverse impact upon black employees violates Title VII of the Civil Rights Act of 1964?

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record for Respondent, The Goodyear Tire & Rubber Company, certifies that the following list of persons have an interest in the outcome of this case.

Otis Bay and Charles Bean,
Petitioners

The Goodyear Tire & Rubber Company,
Respondent.[1]

Respectfully submitted,

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1. The United States subsidiaries of The Goodyear Tire & Rubber Company include Cosmoflex Inc.; Goodyear Aerospace Corp.; Goodyear Atomic Corp.; The Goodyear Bank; Goodyear Farms; Goodyear Financial Corp.; Goodyear International Corp.; Goodyear International Export Corp.; Goodyear International Finance Corp.; The Goodyear Rubber Plantations Co.; Goodyear Western Hemisphere Corp.; Granford Manufacturing Inc.; Lee Tire & Rubber Co.; Litchfield Park Properties; Motor Wheel Corp.; and Reneer Films Corp.

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATEMENT OF THE CASE

The statement of facts in the Petition is so skewed toward Petitioners' view that Respondent does not believe it affords the Court a fair view of this case. The Petition omits critical facts and misstates others.

The evidence on which the District Court based its judgment for Respondent is set out fully in the Findings of Fact and Conclusions of Law. (Pet. App. AA-1 to 46). The Fifth Circuit Court of Appeals found "ample" support for the District Court's findings upon review of the

record and affirmed the District Court's judgment. (Pet. App. B-2). The Court of Appeals viewed Petitioners as having limited themselves on appeal "to their dissatisfaction with the district court's factual determinations that Goodyear's promotional policies did not have a discriminatory impact upon the individual plaintiffs, nor on the class . . ." (*Id.*)

This action involves the question whether Respondent discriminated against black employees in the awarding of supervisory promotions during the period from November 8, 1969 to March, 1980, the date of trial. Goodyear's Houston plant is organized into several distinct departments. Candidates for promotions to supervisory jobs come from the ranks of hourly and salaried non-exempt employees in each department. (Pet. App. AA-3). An employee is only eligible for a supervisory promotion if a vacancy occurs in the department in which he is working. Employees have access to non-supervisory jobs in all departments through a contractual bidding and job posting system. Employees who bid are awarded posted bargaining unit jobs based on seniority. (Pet. App. AA-30).

During the time period relevant to this case (1969-80), a total of 37 supervisory promotions in 6 different departments occurred. Of these 37 promotions, 8 (or 21.6%) went to black employees. (Pet. App. AA-29). In addition, Goodyear made 3 offers of supervisory promotions to black employees who refused the offers. No white employee refused a promotion. If total supervisory promotion offers are calculated, blacks received 27.5% of all offers. During the time period at issue, the percentage of blacks in Goodyear's work force increased from 11.7% (1969) to 19.5% (1979). (*Id.*)

Statistical analyses of each department by racial composition, to determine the number of promotions one might expect blacks to receive based purely on departmental representation in each year, resulted in a determination that blacks were awarded *more* than their "expected" number of supervisory promotions. (Pet. App. AA-29 to 33).

In the two departments with the most promotions, Departments 1300 and 1400, with fourteen and six promotions respectively, *no* white employee entering the departments after November, 1961 had been promoted to supervisor. Seven black employees, all with departmental entry dates after 1961, had received supervisory promotions. (Pet. App. AA-29, AA-31).

The District Court found Goodyear had not discriminated against black employees with respect to supervisory promotions during the years from November 8, 1969 to date of trial.[1] (Pet. App. AA-34). The Court of Appeals found "ample evidence" in the record to support that conclusion.

REASONS FOR DENYING THE PETITION

A. The Questions Presented Were Not Raised or Considered Below.

The questions presented by the Petition were not considered on appeal before the Court of Appeals. There the petitioners offered the following Statement of Issues:

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1. The reference in the District Court's finding number 14 to "November 8, 1979" is a typographical error, for throughout the findings the reference is to November 8, 1969. (Pet. App. AA-28-45)

1. Whether Appellants were denied a promotion because of their race.

2. Whether Appellee employs a promotional system which discriminates against blacks because of their race?

Appellants Brief at ii.

The Court of Appeals reviewed the arguments presented by Petitioners and held:

> The plaintiffs' argument on appeal is limited to their dissatisfaction with the district court's factual determinations that Goodyear's promotional policies did not have a discriminatory impact on the individual plaintiffs, nor on the class that the individual plaintiffs represent. After reviewing the record we find that there is ample evidence for the district court's findings, and we cannot declare them to be clearly erroneous.

Pet. App. B-2.

Here, Petitioners have raised issues unrelated to factual determinations, preferring now to concentrate entirely on new legal issues such as whether subjectivity in promotional decisions is a *per se* violation of Title VII regardless of impact. Petitioners have never previously argued that the District Court excluded employment decisions made during the liability period.

This Court has repeatedly refused to consider issues "neither raised before nor considered by the Court of Appeals." E.g., *Adickes v. Kress & Co.*, 398 U.S. 144, 147, n.2 (1970). This result has also been reached where the point may have been raised below but was not dis-

cussed in the appellate court's opinion. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 163-164 (1975). See also, *Neely v. Eby Construction Co.*, 386 U.S. 317, 330 (1967). No exceptional circumstances are present here to warrant waiver of this requirement. See *Stone v. Powell*, 428 U.S. 465, 481, n.15 (1976).

B. The Judgment Below Is Amply Supported In Both Fact and Law and Presents No Issue for Review By This Court. (Response to Question No. 1 of the Petition)

1. There has been no adverse impact.

The Petition carefully avoids any reference to the actual *results* of Goodyear's promotional policies. That omission is not surprising.

Of the 37 supervisory promotions at issue, blacks received 8, and were offered 3 more. Black employees received 21.6% of the promotions, and 27.5% of the offers, yet the percentage of black employees in the work force ranged from 11.7% (1969) to 19.5% (1979). Accordingly, during the liability period blacks received a higher percentage of promotions than their representation in the work force.

Any fair consideration of trends and promotion rates of employees by race must be done in the context of relevant pools from which employees are drawn to fill the vacancies. *Albemarle Paper Company v. Moody*, 422 U.S. 405, 425 (1975). In *Mayor of City of Philadelphia v. Educational Equality League*, 415 U.S. 605, 621 (1974) this Court found that the failure to refer to the relevant labor pool rendered the statistics "meaningless".

Since at Goodyear's Houston Plant the supervisors are selected only from the ranks of the hourly and salaried non-exempt employees in the department in which the vacancy occurs, the pool of candidates for each promotion is employees in the department where the supervisory vacancy occurs.

As found by the District Court, if one examines the supervisory promotions based simply upon what one might statistically expect to occur based on the proportionate makeup of the nonsupervisory workforce within the departments, in the aggregate one would expect blacks to have received nearly 6 promotions based on their representation in the pools from which supervisors are drawn. As stated, blacks actually received 8 promotions (11 offers of promotion) during the period. The District Court carefully summarized the statistical evidence and concluded there was no adverse impact upon blacks from Goodyear's supervisory promotional policies. (Pet. App. AA-33).

In summary, the promotional system Petitioners condemn has had no adverse impact on black employees. Petitioners' first question is really an attempt to have this Court review the District Court's fact findings, which the Court of Appeals affirmed. It presents no substantial question of law for this Court's consideration.

2. Subjectivity in promotional decision-making is not a *per se* violation.

Having failed to show any adverse impact upon blacks, Petitioners are before this Court urging that the mere presence of subjectivity in a promotion process is, regardless of effect, a violation of Title VII. Respondent believes

Petitioners' argument in this regard to border on the frivolous.

Subjectivity cannot be completely expunged from any promotional or hiring decision. *Davis v. Board of School Commissioners of Mobile County*, 600 F.2d 470, modified 616 F.2d 893 (5th Cir. 1979); *Hereford v. Huntsville Board of Education*, 574 F.2d 268, 270 (5th Cir. 1978). See also, *Ramirez v. Hofheinz*, 619 F.2d 442 (5th Cir. 1980). Goodyear does in fact utilize some objective criteria such as departmental experience in making promotional decisions. (Pet. App. AA-40).

Petitioners' obsession with the subjective aspects of the Goodyear system is misplaced. The subjectivity of a system is irrelevant if there is no resulting disparate impact. *Hester v. Southern Ry.*, 497 F.2d 1374, 1381 (5th Cir. 1981). See also, *Johnson v. Uncle Ben's, Inc.*, 628 F.2d 419 (5th Cir. 1980) vacated on other grounds, 101 S.Ct. 1967 (1981); *Rogers v. International Paper Co.*, 510 F.2d 1340, 1345-46 (8th Cir. 1975).

This Court has stated that the use of subjective criteria is not susceptible to challenge at all unless it can first be shown that the criteria select for "promotion in a racial pattern significantly different from that of the pool of [candidates]." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975). Both the District Court and the Court of Appeals found no such showing here.

Petitioners' incantation of *Rowe v. General Motors Corporation*, 457 F.2d 348 (5th Cir. 1972) is of no value here. *Rowe* stands only for the proposition that a promotion system which incorporates subjective procedures may be discriminatory if it operates to exclude

a disproportionate number of blacks from promotions. In *Rowe* the court first looked at the gross disparity in the numbers of blacks being promoted and transferred. Only then did it address the subjectivity of the system as the possible cause of the disparate impact upon blacks. *Accord, Fisher v. Proctor & Gamble Mfg. Co.*, 613 F.2d 527 (5th Cir. 1980). Only after disparate impact was found did the court criticize subjectivity.

The predicate of disparate impact is absent here. Goodyear promoted a greater percentage of black employees than their representational percentage in both the work force as a whole and in each department. The impact of Goodyear's policies on blacks was perhaps disparate, but the impact was favorable to blacks, not adverse.

Petitioners really prefer to have this Court create some guidelines which every employer in the nation must follow in its employment practices. However, the Court has wisely recognized the pitfalls of that approach. "Courts are generally less competent than employers to restructure business practices." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 578 (1978). The touchstone must logically be that explained by the District Court:

> Most importantly, this Court must consider the result of Goodyear's promotional practices. Regardless of whether objective or subjective factors were utilized, did they result in an adverse treatment or impact upon black employees? The answer here is "no." Accordingly, the mere presence of subjective procedures in the promotional process is not discriminatory. *Jenkins v. Caddo-Bossier Association, supra.*

Pet. App. AA-41.

C. All Promotions Made During The Liability Period Were Considered Below. (Response to Question No. 2 of the Petition)

Petitioner here argues, for the very first time, that supervisory promotions made during the liability period were not considered by the courts below. That argument is not based on fact.

As stated above, there were a total of 37 promotions made in the period of November 8, 1969 to the date of trial. Petitioners do not dispute that number. The District Court used that figure in arriving at its conclusion that blacks had received at least their proportionate share of promotions. (Pet. App. AA-3, 28-29). The District Court found that Petitioners failed to prove discrimination in promotions from November 8, 1969 to the date of trial. (Pet. App. AA-45). The Court of Appeals affirmed. Petitioners have not previously, nor do they now, identify a single promotion from November 8, 1969 to trial that the District Court excluded from consideration. There were none.

Petitioners really seek to have this Court retry the action and hold Goodyear liable for a lack of black promotions *prior* to November 8, 1969. However, as Petitioners admit, the issue at trial was not events occurring prior to November 8, 1969, but only promotions made thereafter.[2] As the District Court stated:

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2. It should be noted that there was no allegation of discriminatory hiring or initial assignment made in the trial court. As stated previously, all employees were free to transfer (bid) to other departments based only on seniority.

> The focus here necessarily must be on what happened during the liability period from November 8, 1969 to date. How many supervisory promotional opportunities became available? Who got them? In other words did Goodyear's supervisory promotional policies prevent black employees from receiving their proportionate share of promotions?

Pet. App. A-28.

This Court has repeatedly stressed the necessity of considering employment decisions which occurred during the time frame relevant to the lawsuit. *Hazelwood School District v. United States,* 433 U.S. 299, 309 (1977); *United Airlines, Inc. v. Evans,* 431 U.S. 553 (1977). See also, *Ste. Marie v. Eastern R. R. Assn.,* ____F.2d ____, 26 FEP 167, 174 (2nd Cir. 1981); *Movement for Opportunity and Equality v. General Motors Corp.,* 622 F.2d 1235, 1245 (7th Cir. 1980). Consistent with this authority, all 37 supervisory promotions made from November 8, 1969 to the date of trial were considered by the District Court.

Petitioners offer only the completely unsubstantiated assertion that the lower courts "pick[ed] an arbitrary point within that period and exclude[d] other points." Petition at 14-15. The District Court excluded no period of time or promotion from November 8, 1969 to the date of trial, as evidenced by the Findings and Conclusions. Petitioners' assertion to the contrary misrepresents the facts as found and affirmed below.

CONCLUSION

If ever there were a case that does not deserve consideration by the Supreme Court, this is it.

This case was correctly decided on the facts and law in the lower courts. The questions presented by Petitioners provide no basis for this Court's discretionary powers of review, and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Response to Petition for Writ of Certiorari have been mailed to the Attorney of Record for Petitioners on this the 19th day of August, 1981.

RICHARD R. BRANN